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Message Text

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E.O. 11652: N/A
TAGS; ETRD, OECD
SUBJ: DRAFT REPORT ON GOVERNMENT PURCHASING

REF: TFD/TD/897

1. THE REFERENCED DOCUMENT CONTAINS THE DRAFT REPORT ON GOVERNMENT PURCHASING TO BE SUBMITTED BY THE TRADE COMMITTEE WORKING PARTY (TCWP) TO THE TRADE COMMITTEE. THE TCWP WILL MEET ON JANUARY 12 AND 13 TO FINALIZE THIS REPORT, THE TEXT OF WHICH FOLLOWS:
BEGIN TEXT:
GOVERNMENT PURCHASING
DRAFT REPORT BY THE WORKING PARTY TO THE TRADE COMMITTEE
1. AS AGREED AT THE LAST MEETING OF THE TRADE COMMITTEE (TC/M(75)3(PROV.), ITEM 8(A)) THE WORKING PARTY NOW SUBMITS A REPORT TO THE COMMITTEE ON THE PROGRESS OF ITS WORK. SINCE THE LAST WRITTEN REPORT (TC(74)1) SUBMITTED AT THE 39TH MEETING OF THE COMMITTEE IN
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FEBRUARY 1974 (TC/M(74)1,ITEM 5), THE WORKING PARTY

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HAS ACTIVELY PURSUED ITS WORK ON PROBLEMS IN CONNEC-
TION WITH THE DRAFT INSTRUMENT, THE OBJECT OF WHICH
IS TO ELIMINATE DISCRIMINATION IN GOVERNMENT PURCHAS-
ING. AS REQUESTED, THE WORKING PARTY HAS ALSO EN-
DEAVOURED TO ASSEMBLE FACTUAL DATA ON CONTRACTS
AWARDED BY PURCHASING ENTITIES IN MEMBER COUNTRIES.
(NOTE: THE REFERENCE PAPERS ARE AT PRESENT:
- DRAFT INSTRUMENT TFD/TD/840(1ST REVISION), SUBJECT
TO AMENDMENTS AGREED OR UNDER CONSIDERATION:TFD/TD/877
ANNEX, TFD/TD/893, 894 AND 896; TFD/TD/881;
- FACTUAL ENQUIRY: TFD/TD/.792, 804, 805, SERIES 821
AND ADD., TFD/TD/847 AND CORR., TFD/TD/866. END NOTE.)
2. HAVING REGARD TO RESULTS TO DATE, AND ALSO
TO THE MAJOR QUESTIONS STILL AT ISSUE, THE WORKING
PARTY CONSIDERS IT PARTICULARLY USEFUL THAT THE COM-
MITTEE SHOULD CONSIDER THE ORIENTATION TO BE GIVEN
TO ITS WORK. THE COMMITTEE WILL PROBABLY HAVE IN MIND
THE POSSIBLE RELATIONSHIP WITH THE MULTILATERAL TRADE
NEGOTIATIONS, WITH THE POSSIBLE IMPLICATIONS WITH RE-
GARD TO CONTINUATION OF THE WORK, NOTABLE FROM THE
POINT OF VIEW OF THE TIME HORIZON. THE TIME WOULD
ALSO APPEAR TO HAVE COME TO REFLECT ON THE PROSPECTS
OPENED UP BY THESE RATHER LONG STUDIES. IN THE
OPINION OF CERTAIN DELEGATIONS THE INDICATIONS AS TO
THE REAL POSSIBILITIES OF ARRIVING AT A SUCCESSFUL
CONCLUSION ARE NOT AS YET CONVINCING. A NUMBER
OF OTHER DELEGATIONS FEEL THAT THE RESULTS ACHIEVED
PROVIDE THE OPPORTUNITY, ON THE BASIS OF OPTIONS TO
BE FORMULATED, TO MAKE DECISIVE PROGRESS WITHIN THIS
FRAMEWORK.
3. AS IT STANDS AT PRESENT THE DRAFT INSTRUMENT IS A
COMPLETE OUTLINE SOLUTION THE TEXT OF WHICH FOR THE
MOST PART IS ELABORATED. SINCE THE LAST DRAFT WAS
SUBMITTED TO THE COMMITTEE, THE WORKING PARTY HAS BEEN
ABLE TO CONSOLIDATE TO A CERTAIN EXTENT THE "PROVISIONS
OF SUBSTANCE" OF THE DRAFT INSTRUMENT AND IN PARTICULAR
THE PROVISIONS APPLICABLE BY THE PURCHASING ENTITIES
TO ENSURE EFFECTIVE COMPLIANCE WITH THE
PRINCIPLE OF NON-DISCRIMINATION IN THE PURCHASING PRO-
CESS. THE WORK HAS ALSO RESULTED IN THE PREPARATION
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OF A TEXT, A LARGE PART OF WHICH IS COMMON GROUND, ON
THE REGULAR SURVEILLANCE OF THE INSTRUMENT. IT HAS
ALSO PROGRESSED ON THE QUESTION OF NON-DISCRIMINATION
AND CERTAIN ASPECTS OF THE FINAL PROVISIONS HAVE
BEEN TOUCHED UPON. AT THE LAST MEETING OF THE WORKING
PARTY CERTAIN PROPOSALS WERE MADE TO WHICH THE WORKING
PARTY HAS NOT YET BEEN ABLE FULLY TO REACT, CONCERNING
SOME OF THE IMPORTANT QUESTIONS REFERRED TO BELOW.

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4. THE MAIN PROBLEMS WHICH THE WORKING PARTY WISHES TO SUBMIT TO THE COMMITTEE ARE GROUPED TOGETHER UNDER FOUR HEADINGS:

I FIELD OF APPLICATION AND EQUILIBRIUM OF THE INSTRUMENT (PARAGRAPH 5 TO 13):

- PURCHASING ENTITIES (PARAGRAPH 6)
- THRESHOLD (PARAGRAPH 8)
- DEROGATIONS AND SAFEGUARD CLAUSE (PARAGRAPH 10)

II SETTLEMENT OF DISPUTES AT INTERNATIONAL LEVEL (PARAGRAPHS 14 TO 19):

- BODIES RESPONSIBLE FOR THE SETTLEMENT OF DISPUTES (PARAGRAPH 16)
- SANCTIONS (PARAGRAPH 19)

III TRANSPARENCY OF THE INSTRUMENT (PARAGRAPH 20 TO 23):

- EX POST PUBLICITY
- STATISTICS
- CASES IN WHICH THE PURCHASING PROCEDURES PROVIDED FOR NEED NOT BE APPLIED.

IV TREATMENT OF DEVELOPING COUNTRIES (PARAGRAPH 24 TO 26)

THE ANNEX COMPLETES THIS LIST ON OTHER MORE SPECIFIC QUESTIONS RELATED TO ONE OR OTHER OF THESE HEADINGS.I. FIELD OF APPLICATION AND EQUILIBRIUM OF THE INSTRUMENT

5. APART FROM THE QUESTION OF THE EXCEPTIONS MENTIONED IN THE ANNEX, THE PARAMETERS OF THE FIELD OF APPLICATION OF THE INSTRUMENT ARE THE PURCHASING ENTITIES TO WHICH THE PROVISIONS WOULD BE APPLICABLE, THE LEVEL OF THE THRESHOLD (BELOW WHICH CERTAIN PROVISIONS OF THE INSTRUMENT OR THE WHOLE INSTRUMENT MIGHT NOT APPLY), AND THE POSSIBLE DEROGATIONS AND SAFEGUARD CLAUSE.

THESE QUESTIONS, WHICH ARE ALSO INTERRELATED IN CERTAIN RESPECTS, DETERMINE THE INITIAL EQUILIBRIUM OF THE CONCESSIONS AND THE SUBSEQUENT MAINTENANCE OF THAT EQUILIBRIUM. WITH REGARD TO THIS LAST POINT ANOTHER QUESTION THAT MAY BE MENTIONED HERE, AS A REMINDER, IS THAT OF WITHDRAWAL (WHAT WOULD BE THE IMPLICATIONS FROM THE POINT OF VIEW OF RECIPROCITY OF THE WITHDRAWAL OF A SIGNATORY COUNTRY, PARTICULARLY ONE OF THE MAJOR PARTNERS).

6. AS REGARDS THE PURCHASING ENTITIES, THE PROBLEM IS THAT (FOR REASONS OF CONSTITUTIONAL, ADMINISTRATIVE

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OR ECONOMIC ORGANISATION) THE IMPORTANCE AND THE NATURE
OF THE ENTITIES COMING UNDER THE AUTHORITY OF GOVERN-
MENTS, AND IN RESPECT OF WHICH THE LATTER MAY ACCEPT
THE OBLIGATIONS OF THE INSTRUMENT ON THE BASIS OF
STRICT RECIPROCITY, VARY FROM ONE COUNTRY TO ANOTHER.
THE SITUATION IS DIFFERENT, FOR EXAMPLE, AS REGARDS
MAJOR SECTORS OF ACTIVITY. (NOTE: IN THE COURSE OF THE
ENQUIRY CARRIED OUT AT THE REQUEST OF THE TRADE COMMITTEE
THE WORKING PARTY OBTAINED CERTAIN GLOBAL, QUANTITATIVE
INFORMATION ON THE PURCHASING ENTITIES UNDER GOVERNMENT
CONTROL AND THE CATEGORIES OF PRODUCTS PURCHASED, AS
WELL AS QUALITATIVE INFORMATION ON THE MAIN ACTIVITIES
IN THE PUBLIC SECTOR.) FOR ENTITIES IN THE PUBLIC
SECTOR WHICH DO NOT COME DIRECTLY UNDER GOVERNMENT
AUTHORITY AS "BEST ENDEAVOURS CLAUSE" AGREED BY
GOVERNMENTS WOULD NOT NECESSARILY HAVE THE SAME PUR-
PORT IN ALL COUNTRIES.
7. UNDER ONE APPROACH, TO ENSURE THAT THERE IS SUFFI-
CIENT RECIPROCITY AND COMMERCIAL INCENTIVE, THE FIELD
OF APPLICATION OF THE INSTRUMENT SHOULD BE AS WIDE AS
POSSIBLE: ALL THE ENTITIES UNDER GOVERNMENT CONTROL
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WOULD BE MADE DIRECTLY SUBJECT TO IT BY EACH COUNTRY, WHILE FOR THE OTHER ENTITIES IN THE PUBLIC SECTOR GOVERNMENTS WOULD SUBSCRIBE TO THE "BEST ENDEAVOURS" CLAUSE. UNDER THE OTHER APPROACH, AN ACCEPTABLE SOLUTION WOULD IMPLY ENVISAGING THE FIELD OF APPLICATION OF THE INSTRUMENT AT AN AVERAGE LEVEL (WHICH MIGHT BE THE STARTING POINT OF AN EVOLVING FORMULA). THIS LEVEL OF EQUILIBRIUM COULD BE DETERMINED IN THE LIGHT OF SEVERAL CRITERIA. CONCESSIONS WOULD PROBABLY IMPLY SOME FLEXIBILITY IN DEFINING FOR EACH COUNTRY WHICH PURCHASING ENTITIES SHOULD BE SUBJECT TO THE INSTRUMENT. AMONG THE QUESTIONS RAISED BY ONE OR THE OTHER APPROACH, AND WHICH AFFECT THE POSSIBILITY OF DEFINING EQUILIBRIUM WITHIN THE FRAMEWORK OF THE INSTRUMENT, ARE THE SCOPE OF A BEST ENDEAVOURS CLAUSE, ADOPTED BY GOVERNMENTS, IN THE DIFFERENT COUNTRIES, AND THE POSSIBILITY OF DIFFERENT TREATMENT OF COMPARABLE SECTORS OF ACTIVITY FROM ONE COUNTRY TO ANOTHER.
8. AS REGARDS THE THRESHOLD OF VALUE ABOVE WHICH INDIVIDUAL CONTRACTS WOULD FALL WITHIN THE SCOPE OF THE INTERNATIONAL OBLIGATIONS, THE FIRST QUESTION CONCERNS THE LEVEL AT WHICH IT WILL BE FIXED. SOME DELEGATES WOULD PLACE IT AS LOW AS POSSIBLE IN ORDER TO COVER ANY CONTRACT OF POTENTIAL IMPORTANCE FOR INTERNATIONAL COMPETITION. OTHER DELEGATES WOULD PREFER A HIGHER THRESHOLD IN ORDER TO AVOID THE ADMINISTRATIVE BURDEN THAT WOULD RESULT FROM THE APPLICATION OF STRICT PROCEDURES TO A LARGE NUMBER OF SMALL CONTRACTS, WITHOUT THERE NECESSARILY BEING ANY APPRECIABLE INCREASE IN TERMS OF THE PERCENTAGE SHARE IN VALUE OF THE CONTRACTS COVERED.(NOTE: IN THE COURSE OF ITS ENQUIRY THE WORKING PARTY COLLECTED SOME INFORMATION ON THE DISTRIBUTION OF CONTRACTS IN NUMBER AND IN VALUE, ALTHOUGH IT HAS NOT YET BEEN ESTABLISHED WHETHER THIS INFORMATION IS ADEQUATE TO BACK UP CERTAIN CONCLUSIONS.)
9. THE SECOND PART OF THE QUESTION IS WHETHER THE WHOLE INSTRUMENT WOULD BE DETERMINED BY THE THRESHOLD, AS CERTAIN DELEGATES WOULD PREFER, FOR REASONS OF RECIPROCITY (UNLESS THE THRESHOLD IS SUFFICIENTLY LOW), OR WHETHER THERE WOULD BE A GENERAL UNDERTAKING WITH LIMITED OFFICIAL USE

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REGARD TO NON-DISCRIMINATION, THE THRESHOLD DETERMINING ONLY THE APPLICATION OF COMMON PROVISIONS FOR THE AWARD OF CONTRACTS. SEVERAL DELEGATES WOULD BE IN FAVOUR OF THIS SECOND APPROACH, IN SPITE OF THE

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PROBLEMS INVOLVED FOR CONTRACTS BELOW THE THRESHOLD. IN THE FIRST CASE GOVERNMENTS WOULD BE FREE IN THEIR POLICIES AND PRACTICES IN RESPECT OF CONTRACTS BELOW THE THRESHOLD (AND WOULD NOT HAVE TO ASK FOR DEROGATIONS FOR THESE CONTRACTS). IF THE SECOND ALTERNATIVE, A COMMITMENT OF A GENERAL NATURE, WERE ADOPTED, THERE WOULD BE CLOSER PARALLELISM BETWEEN THE VARIOUS INTERNATIONAL UNDERTAKINGS WITH REGARD TO NON-DISCRIMINATION.

10. THE QUESTION WHETHER OR NOT THERE SHOULD BE DEROGATIONS (MAKING POSSIBLE THE NON-APPLICATION, IN PRINCIPLE ON A TEMPORARY BASIS, BY A GOVERNMENT OF THE OBLIGATIONS IMPOSED BY THE INSTRUMENT TO CONTRACTS COMING WITHIN ITS SCOPE) HAS LONG BEEN UNDER DISCUSSION IN THE WORKING PARTY (THE QUESTION AS REGARDS DEVELOPING MEMBER COUNTRIES IS DEALT WITH UNDER HEADING IV). THE WORKING PARTY WAS NOT ABLE TO AGREE ON PROVISIONS FOR DEROGATIONS WHICH, WHILE TAKING INTO ACCOUNT THE VARIOUS REASONS (REGIONAL DEVELOPMENT AID, SMALL AND MEDIUM-SIZED ENTERPRISES, EMPLOYMENT PROBLEMS, ETC.) FOR WHICH ONE OR OTHER OF THE GOVERNMENTS MAY CONSIDER IT NECESSARY TO RETAIN WITHIN CERTAIN LIMITS THE POSSIBILITY OF INTERVENING THROUGH GOVERNMENT PURCHASING, WOULD NOT GIVE RISE TO STRONG OBJECTIONS FROM OTHER SIDES, ON THE GROUNDS THAT OTHERS WOULD FOLLOW SUIT AND THAT THERE WOULD BE CONSTANT UNCERTAINTY AS TO THE DEGREE OF EFFECTIVE APPLICATION OF THE OBLIGATIONS. FOR THESE REASONS A NUMBER OF DELEGATES WERE FIRMLY OPPOSED TO DEROGATIONS; OTHERS ARGUED THAT IT WAS NECESSARY TO COVER THEIR COUNTRY'S PROBLEMS EFFECTIVELY; OTHER DELEGATES HAD NOT YET TAKEN A POSITION.

11. AT A RECENT MEETING OF THE WORKING PARTY SEVERAL DELEGATIONS PUT FORWARD A PROPOSAL THAT A SINGLE SAFEGUARD CLAUSE BE INCLUDED IN THE INSTRUMENT TO COVER SERIOUS, UNEXPECTED IFFICULTIES. THE CLAUSE PROPOSED PROVIDES FOR STRICT LIMITS ON THE POSSIBLE USE OF SAFEGUARD MEASURES. SOME DELEGATES OPPOSED THIS PRO-

POSAL, REFERRING TO THE VARIOUS SAFEGUARDS ALREADY PROVIDED FOR IN INTERNATIONAL UNDERTAKINGS, AND FEARING THAT SUCH A PROVISION MIGHT RUN COUNTER TO THE AIMS OF THE INSTRUMENT. A NUMBER OF OTHER DELEGATES WERE IN FAVOUR OF THE PROPOSAL. SOME OF THEM, HOWEVER, WONDERED ABOUT THE POSSIBILITY OF PROVIDING FOR MORE FLEXIBLE CONDITIONS FOR RESORT TO THE SAFEGUARD CLAUSE, WHILE RETAINING THE STRICT LIMITS ON ITS APPLICATION AND LIMITING MORE SEVERELY THE SCOPE OF POSSIBLE MEASURES.

12. AS REGARDS THE PROBLEMS OF THE EXISTING ARRANGEMENTS, SOME DELEGATES WHO HAD EARLIER REQUESTED DERO-

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GATIONS SUGGESTED ANOTHER SOLUTION. THEIR GOVERNMENTS CONSIDER IT IMPOSSIBLE TO CANCEL SUCH ARRANGEMENTS IMMEDIATELY. HOWEVER, SOME CHANGES IN THE LONGER TERM WERE NOT ENTIRELY EXCLUDED. THEY PROPOSED

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TO MAKE KNOWN, WHEN ADHERING TO THE INSTRUMENT, THE PRESENT TENOR AND SCOPE OF THE ARRANGEMENTS IN QUESTION, AND WOULD DROP ANY OTHER REQUEST. THIS NOTIFICATION MIGHT BE THE SUBJECT OF EXAMINATION AT THE INITIAL STAGE, AND THEN PERIODICALLY.

13. OTHER DELEGATES COULD NOT SUBSCRIBE TO AN IDENTICAL SOLUTION FOR THEIR PROBLEMS, INSOFAR AS THESE CONSISTED, NOT IN THE NEED TO RETAIN PRESENT MEASURES, BUT IN THAT TO ENSURE A CERTAIN AD HOC FLEXIBILITY, IN CASES OF LIMITED IMPORTANCE, IN THE FUTURE APPLICATION OF THE INSTRUMENT. TWO POSSIBILITIES WERE MENTIONED: POSSIBLE SCOPE OF THRESHHOLD REFERRED TO IN PARAGRAPH 9; QUESTION OF AD HOC INVOCATION OF THE SAFEGUARD CLAUSE, REFERRED TO IN PARAGRAPH 11 ABOVE.

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II. MACHINERY FOR DISPUTE SETTLEMENT AT INTERNATIONAL LEVEL

14. ALTHOUGH IT IS ACCEPTED THAT EVERY EFFORT SHOULD BE MADE TO FACILITATE THE SETTLEMENT OF DIFFICULTIES AT THE

LOWEST LEVEL (IN THE FIRST INSTANCE, WITHIN THE FRAMEWORK OF NATIONAL COMPLAINTS PROCEDURES AND THEN WITHIN THE FRAMEWORK OF BILATERAL CONSULTATIONS), THE MACHINERY FOR DISPUTE SETTLEMENT AT INTERNATIONAL LEVEL IS OF MAJOR IMPORTANCE FROM THE POINT OF VIEW OF THE ACCEPTABILITY OF THE INSTRUMENT, ITS OPERATION AND, FINALLY, DURABLE PARTICIPATION BY THE SIGNATORY COUNTRIES. IN THE VIEW OF SOME, BECAUSE OF THE ASPECTS WHICH ARE BOUND UP IN PARTICULAR WITH THE NUMBER AND NATURE OF THE DISPUTES LIKELY TO ARISE, THE SPECIFIC CONCEPT OF THE DISPUTE SETTLEMENT PROCEDURE CANNOT BE WHOLLY DISSOCIATED FROM THE QUESTION OF THE FRAMEWORK AND THE INSTITUTIONAL CONTEXT OF IMPLEMENTATION.

15. THE QUESTIONS IN THIS FIELD AROSE INITIALLY FROM TWO SETS OF FUNDAMENTAL CONSIDERATIONS: ON THE ONE HAND, THE EMPHASIS PLACED ON THE NEED TO TAKE ACCOUNT OF THE INTERESTS AND RESPONSIBILITIES OF GOVERNMENTS WITHIN THE FIELD COVERED BY THE INSTRUMENT, WHICH PROMPTED ALL DELEGATES TO RECOGNISE THE SOVEREIGNTY OF THE COMMITTEE OF REPRESENTATIVES OF SIGNATORY GOVERNMENTS IN THE MATTER OF DISPUTE SETTLEMENT; ON THE OTHER HAND, THE DESIDERATUM OF A MACHINERY WHICH WOULD BE ADAPTABLE TO THE VARIOUS PROBLEMS LIKELY TO ARISE, EQUITABLE, EFFECTIVE AND MORE OPERATIONAL THAN THE COMMITTEE, A DESIDERATUM TO WHICH THE WORKING PARTY ALSO LARGELY SUBSCRIBED. HOWEVER, APPROACHES WITH REGARD TO THIS MATTER ARE NOT YET UNIFIED. IT IS A QUESTION IN PARTICULAR OF THE CONCEPTION OF THE NATURE AND ROLE OF RESTRICTED BODIES IN DISPUTE SETTLEMENT.

16. CERTAIN DELEGATES STRESSED THAT A DISPUTE WHICH WAS NOT SPEEDILY SETTLED AT THE LEVEL OF GOVERNMENTS SHOULD BE ABLE TO BE SUBMITTED, AT THE REQUEST OF ANY PARTY CONCERNED, TO THE JUDGEMENT OF INDEPENDENT EXPERTS; THE BALANCED AND RESTRICTED BODY THAT WOULD MEET THOSE REQUIREMENTS WOULD HAVE THE TASK OF EXAMINING THE CASE AND DECIDING WHAT ACTION SHOULD BE TAKEN. THE COMMITTEE OF REPRESENTATIVES OF GOVERNMENTS WOULD RETAIN A RIGHT OF VETO OVER SUCH DECISIONS: IN THE VIEW OF THESE DELEGATES, THIS APPROACH TAKES INTO ACCOUNT ALL THE CONSIDER-

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ATIONS SET OUT ABOVE IN PARAGRAPH 15.

17. OTHER DELEGATES, WHO FAVOUR A CONCEPTION ALIGNED MORE FUNDAMENTALLY ON THE CONSENSUS OF THE SIGNATORY GOVERNMENTS, HAVE PUT FORWARD AS A BASIS FOR A COMPROMISE A PROPOSAL FOR A TWO-CHANNEL SYSTEM: ON THE ONE HAND, THE POSSIBILITY FOR THE PARTIES, IF THEY SO AGREE, TO GO TO ARBITRATION; ON THE OTHER HAND, A PROCEDURE BASED ON A RESTRICTED BODY OF THE COMMITTEE OF SIGNATORY COUNTRIES, WHOSE ESSENTIAL FUNCTION WOULD BE TO PRESENT TO THE COMMITTEE RECOMMENDATIONS AS TO THESOLUTIONS TO BE APPLIED TO THE DISPUTES CONCERNED.

18. AMONG THE QUESTIONS RAISED CONCERNING SUCH A RESTRICTED BODY ENVISAGED AS A PERMANENT INSTITUTION, ARE THE NUMBER OF MEMBERS, REPRESENTATION OF THE VARIOUS SIGNATORY GOVERNMENTS, PROCEDURE FOR CONSULTATION OF EXPERTS, THE EFFECTIVE WEIGHT OF THE BODY IN RELATION TO THE COMMITTEE, DECISION-MAKING PROCEDURES. SUBJECT OT ANSWERS BEING GIVEN TO THEIR PARTICULAR PRE-OCCUPATIONS, A LARGE NUMBER OF THE DELEGATES WOULD SEEM TO REGARD THIS PROPOSAL AS AN ACCEPTABLE BASIS OF WORK. OTHER DELEGATES HAVE RESERVED THEIR JUDGEMENT.

19. THE OTHER POINT OF DIFFERENCE IN THE CONTEXT OF DISPUTE SETTLEMENT CONCERNS THE QUESTION WHETHER PRO-VISION SHOULD BE MADE FOR THE POSSIBILITY OF SANCTIONS AGAINST COUNTRIES IN A SITUATION OF SERIOUS INFRINGEMENT. SOME DELEGATES CONSIDER THAT THIS IS AN ESSENTIAL ELEMENT OF AN EFFECTIVE MACHINERY FOR DISPUTE SETTLEMENT. THE GREATER NUMBER OF DELEGATES HAVE NOT SUBSUCRIBED TO THESE VIEWS: A FIRM UNDERTAKING BY GOVERNMENTS TO OBSERVE AND ENFORCE THE RECOMMENDATIONS THAT WOULD BE ADDRESSED TO THEM SEEMS TO THESE DELEGATES TO BE OF SUFFICIENT WEIGHT IN THE ASSUMPTIONS THEY ADOPT CONCERNING THE COUNTRIES WHICH WOULD BE PARTIES TO SUCH AN INSTRUMENT.

III. NECESSARY DEGREE OF TRANSPARENCY IN THE INSTRUMENT

20. THE PROVISIONS OF THE DRAFT INSTRUMENT RELATING TO PURCHASING PROCEDURES ARE AIMED AT ENSURING, MAINLY

THROUGH EX ANTE PUBLICITY AND EXTENSIVE PROVISION OF INFORMATION TO SUPPLIERS, A SUFFICIENT DEGREE OF TRANSPARANCY IN CONTRACTS TO PERMIT WIDE AND EQUITABLE

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PARTICIPATION. AS HAS BEEN NOTED, THIS PRIOR PUBLICITY IS ENVISAGED ONLY FOR CONTRACTS ABOVE A CERTAIN THRESHHOLD.

21. ONE OF THE MAJOR POINTS OF DIFFERENCE STILL REMAINING WITH REGARD TO THE TRANSPARENCY OF THE DRAFT INSTRUMENT CONCERNS THE EX POST PUBLICATION OF EACH CONTRACT, CONTAINING BRIEF ESSENTIAL INDICATIONS (AMOUNT OF CONTRACT AWARDED, NATURE AND QUANTITY OF PRODUCTS, AND NAME OF THE SUCCESSFUL TENDERER). CERTAIN DELEGATES CONSIDER THAT THIS IS THE SOLE MEANS OF ENSURING SUFFICIENTLY EXTENSIVE PROVISION OF INFORMATION AND EASY SURVEILLANCE OF ALL ASPECTS OF THE INSTRUMENT. OTHER DELEGATES REMAINED OPPOSED TO SUCH A PROVISION, WHICH IN THEIR VIEW WOULD ENTAIL AN EXCESSIVE NUMBER OF DISPUTES; THIS IS IN ADDITION TO THE CONSIDERATION THAT THE DISCLOSURE OF AMOUNTS OF CONTRACTS CONSTITUTES A DANGER FOR SUBSEQUENT COMPETITION.

22. THE QUESTION OF REGULAR STATISTICS, WHICH COULD

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FACILITATE SURVEILLANCE OF THE INSTRUMENT, AND , IN PARTICULAR, THE SETTLEMENT OF DISPUTES BETWEEN GOVERNMENTS, HAS BEEN BROUGHT UNDER STUDY BY THE WORKING PARTY. THE DEGREE OF DETAIL AND THE NATURE OF THE INFORMATION NECESSARY WOULD BE BOUND UP, IN THE EYES OF CERTAIN DELEGATIONS, WITH THE QUESTION OF EX POST PUBLICATION.

23. ANOTHER IMPORTANT POINT OF DIVERGENCE, WHICH RELATES BOTH TO TRANSPARENCY AND TO RECIPROCITY IN THE APPLICATION OF THE INSTRUMENT, STILL REMAINS WITH REGARD TO THE LIST DEFINING THE CASES IN WHICH PURCHASING ENTITIES WOULD NOT NEED TO APPLY THE OPEN OR SELECTIVE PROCEDURES AS LAID DOWN, AND COULD USE PROCEDURES WHICH DID NOT PRESENT THE SAME FORMAL GUARANTEES FROM THE STANDPOINT OF COMPETITION AND MIGHT INVOLVE PURCHASING THROUGH DIRECT DEALING WITH A SUPPLIER; SOME DELEGATES REGARD AS UNACCEPTABLE THE RETENTION BY OTHER DELEGATES IN THIS LIST OF CASES WHICH DO NOT IN THEIR VIEW REPRESENT OBJECTIVE INSTANCES OF INABILITY TO FOLLOW THE NORMAL RULES AND WHICH MAY COVER DE FACTO DEROGATIONS FROM THE LIMITED OFFICIAL USE

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PRINCIPLE OF NON-DISCRIMINATION.

IV. TREATMENT OF DEVELOPING COUNTRIES

24. THE DELEGATES FROM THE DEVELOPING MEMBER COUNTRIES HAVE MAINTAINED THE POSITION THAT FOR REASONS OF EQUILIBRIUM, AND HAVING REGARD TO THE PARTICULAR SITUATION OF THEIR COUNTRIES, A GENERAL DEROGATION CLAUSE SHOULD BE PROVIDED FOR THEIR BENEFIT; THIS CLAUSE WOULD NOT BE INCOMPATIBLE, IN PRACTICE, WITH THE POSSIBILITY OF THESE COUNTRIES APPLYING CERTAIN PROVISIONS OF THE INSTRUMENT, MOVING PROGRESSIVELY FORWARD UNTIL THEY ACHIEVED FULL APPLICATION.

25. THE PRINCIPLE OF APPROPRIATE TREATMENT UNDER THE INSTRUMENT OF DEVELOPING COUNTRIES IS RECOGNISED BY THE WORKING PARTY. ONE OF THE QUESTIONS POSED IN THIS REGARD IS WHETHER, AND ON WHAT TERMS, THE DEVELOPING COUNTRIES UNABLE TO APPLY ALL, OR SOME, OF THE OBLIGATIONS COULD ACCEDE TO THE INSTRUMENT. NON-ACCESSION BY DEVELOPING COUNTRIES WOULD NOT PREVENT THEIR BEING GRANTED BY THE SIGNATORY COUNTRIES ADVANTAGES IN THE FIELD COVERED BY THE INSTRUMENT (THE DISCUSSION ON THE QUESTION OF NON-DISCRIMINATION HAVING SHOWN THAT THE SIGNATORY COUNTRIES WOULD RETAIN THE POSSIBILITY TO GRANT ADVANTAGES IDENTICAL TO THOSE UNDER THE INSTRUMENT, IN PARTICULAR TO DEVELOPING COUNTRIES).

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26. CERTAIN DELEGATES REGARDED FURTHER CONSIDERATION OF THIS QUESTION AS PREMATURE WHEN THE AMIN PARAMETERS OF THE INSTRUMENT HAD NOT YET BEEN FIXED. OTHER DELEGATES CONSIDER IT DESIRABLE AND TIMELY. A CONTRIBUTION COULD BE MADE TO THE OVERALL THINGING OF THE TRADE COMMITTEE ON DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES.

ANNEX

OTHER QUESTIONS OUTSTANDING

1. EXCEPTIONS

WITH A VIEW TO ENABLING CONCESSIONS TO BE FIXED
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AT AN ACCEPTABLE AND SUFFICIENT LEVEL, THE QUESTION HAS BEEN RAISED OF INCLUDING NON-MILITARY PURCHASES BY DEFENSE MINISTRIES IN THE SCOPE OF THE INSTRUMENT. VIEWS DIFFER HOWEVER AS TO THE NECESSITY AND POSSIBILITY OF ESTABLISHING A COMMON DEFINITION (POSSIBLY ON THE BASIS OF POSITIVE LISTS OF EQUIPMENT).

THE QUESTION WHETHER IT IS JUSTIFIABLE TO PROVIDE FOR CERTAIN OTHER EXCEPTIONS TO THE INSTRUMENT (PURCHASING FOR THE ACCOUNT OF AN INTERNATIONAL ORGANIZATION IN ACCORDANCE WITH ITS OWN RULES, OR FOR THE ACCOUNT OF A NON-SIGNATORY GOVERNMENT) HAS NOT YET BEEN RESOLVED.

2. COMPENSATORY PURCHASES AND OTHER CONDITIONS ATTACHED TO THE AWARD OF CONTRACTS

IT HAS NOT BEEN POSSIBLE TO AGREE ON A PROVISION FOR PROHIBITING THE IMPOSITION OF SUPPLIERS OF REQUIREMENTS AS TO COMPENSATORY PURCHASES OR GRANTING OF LICENSES AS A CONDITION OF THE AWARD OF CONTRACTS.

3. NON-DISCRIMINATION

THE DISAGREEMENTS REMAIN: ON THE ONE HAND, ON THE NEED, FROM THE STANDPOINT OF RECIPROCITY AND EQUITABLE TREATMENT OF PRODUCTS AND SUPPLIERS OF THE SIGNATORY COUNTRIES, TO ADOPT A SPECIFIC RULE OF ORIGIN FOR THE INSTRUMENT ON GOVERNMENT PURCHASING AND, ON THE OTHER HAND, ON THE LEGITIMACY, FROM THE STANDPOINT OF INTERNATIONAL COMMITMENTS AND THE INSTRUMENT, OF FUTURE EXTENSION OF GOVERNMENT PURCHASING ADVANTAGES WITHIN FREE TRADE AREAS AND CUSTOMS UNIONS, WHICH WOULD REMAIN LIMITED TO THE COUNTRIES BELONGING TO THEM.

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4. FINAL PROVISIONS

THE WORKING PARTY HAS HAD ONLY A PRELIMINARY EXCHANGE OF VIEWS ON THE QUESTIONS OF ENTRY INTO FORCE, ACCESSION TERMS, AND WITHDRAWAL TERMS. ONE LIMITED OFFICIAL USE

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QUESTION JUDGED BY SOME TO BE ESSENTIAL IS THAT OF PARTICIPATION AND OF WITHDRAWAL OF KEY COUNTRIES.

5. PROCEDURES FOR OPENING TENDERS

ONE DIVERGENCE STILL REMAINS REGARDING A PROVISION FOR GUARANTEEING, IN OPEN PROCEDURES, THE PUBLIC OPENING OF TENDERS AND THE DISCLOSURE OF THEIR AMOUNT. END TEXT
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